COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

No. 355446

SAN JUAN SUN GROWN, LLC, a Washington limited liability company; and ALEX KWON, an individual;

Appellants,

v.

CHELAN COUNTY, a municipal corporation.

Respondent.

APPELLANTS' REPLY BRIEF

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1. INTRODUCTION

The primary focus of Appellants' Reply Brief will be on explaining Appellants' position on its vested and non-conforming rights and the correct burden of proof to be used in this matter. Resolving these issues will simultaneously resolve a number of other issues by either making them moot (e.g. nuisance claim and unlawful use of the property claim) or by authorizing Appellants' use and requiring the County to proceed with processing Appellants permits (e.g. fence variance, greenhouse building permits) (the County claims it cannot process these permits because they facilitate an illegal use).

2. FACTS

The facts in this matter have been established through prior briefing by the parties and will not be further discussed here.

3. ARGUMENT

3.1 The Hearing Examiner Made An Erroneous Interpretation Of Law When He Placed The Burden Of Proof On Appellants.

The Hearing Examiner placed the burden of proof regarding the validity of the claims in the County's Notice and Order on the Appellants, in essence denying that the County has any burden of proof in its

enforcement actions. CP 22. Via email sent to the parties on November 11, 2016 the Hearing Examiner was uncertain as to which burden of proof applied in this case. CP 1228. The parties weighed in on this question, and via email dated November 14, 2016 the Hearing Examiner declared that "the Appellant has the burden of proof that the decision to issue the Notice and Order was erroneous." CP 1229 – 1235. The Hearing Examiner also supported his decision citing to the Rules of Hearing Examiner Procedure. CP 1476, CP 1701. Here the Hearing Examiner "engaged in unlawful procedure or failed to follow a prescribed process," pursuant to RCW 36.70C.130(1).

The "burden of proof" is the duty of a party to produce evidence that will shift the conclusion away from the default position, to that party's own position. The burden of proof is always on the person who brings a claim in a dispute. Chelan County's arguments on this issue are technically flawed and present grave implications for theoretical application.

First, the Hearing Examiner applied a burden of proof from a completely separate section of the Chelan County Code (e.g. from Title 14 rather than Title 16) that is not related to the enforcement actions. The Notice and Order itself specifically claims to be "[s]ubject to the appeal

provisions of Chapter 16.12," [CP 67] and is a mechanism created pursuant to Chapter 16.06. Title 14, relied upon by the Hearing Examiner to develop a burden of proof, applies to "Development Permit Procedures and Administration" for land development (e.g. building permits, zoning approvals, subdivision entitlements etc.). See e.g. CCC 14.02.005. These are radically different procedures, located in a completely separate title of the code, that relate to situations where an applicant is pursuing a land use entitlement. Title 14 provisions apply where an applicant is bringing a claim of right to the government (e.g. requesting approval of a subdivision plat), as opposed to Title 16 provisions that apply to persons having claims brought against them by the government (e.g. code enforcement). "Cherry picking" a standard found in Title 14 and applying to this Title 16 action is completely inappropriate.

Second, in responding to the multitude of other jurisdictions who's code provisions require the burden of proof to be placed upon the government in an enforcement action, the County's briefing denies that an infraction can be created through the Notice and Order process, but admits: "[s]hould the County pursue a civil infraction against San Juan, a different burden of proof may govern. *Brief of Respondent*, at 38. However, as previously briefed by Appellants, a "Notice and Order" is

defined by the Chelan County Code as a "written notice that a code violation(s) has occurred. " And a "civil code violation" by definition "*constitute[s] a separate* ***infraction*** for each and every day . . . during which a violation is continued." CCC 16.04.010 (emphasis added). Further, civil fines and liens "shall be assessed" for code violations. *See* CCC 16.16.010; CCC 16.18.020; *see also* CCC 16.06.070 (authorizing civil penalties for failure to abide by a Notice and Order). Because the claims in Chelan County's Notice and Order are considered to be civil "infractions," the burden of proof should be consistent with what the legislature determined would be appropriate for civil infraction hearings in RCW 7.80.100(3) (government bears the burden of proof in civil infraction matters).

Third, the County not only argues that it had no burden of proof, but that San Juan has the burden to prove no violation occurred. Essentially, the County argues that, when it comes to issuing a Notice and Order to citizens of Chelan County, Chelan County has no burden of proof and it's the citizens who must defend themselves from the otherwise unsupported accusations. This burden shifting is an egregious distortion of the basic principals of due process we enjoy in this Country. Chelan County argues that such a burden hardly warrants due process concerns,

citing *Cranwell v. Mesec*, 77 Wn. App. 90, 890 P.2d 491 (1995), a case in which the court determined that no pre-notice-of-violation hearing was required by due process as the City of Seattle code did not consider such a notice to amount to anything other than a notice. *Brief of Respondent*, at 36. However, the city in *Cranwell* could not obtain civil penalties without first satisfying its burden of production and proving by a preponderance of the evidence that the violation had, in fact, occurred. *Id.* at 94-95. Only thereafter, could the City lien the property. *Id.* In short, *Cranwell* actually supports Appellants' position on the issue of who bears the burden of proof for proving the claims contained in a Notice and Order.

Moreover, the County suggests that the misallocation of the burden of proof in this case is "irrelevant." *Brief of Respondent*, at 38. However, in *Van Sant v. City of Everett,* 69 Wn.App. 641, 849 P.2d 1276 (1993), a case also dealing with the existence of nonconforming uses, the Court was very concerned regarding the application of the correct burden of proof stating:

> The City asserts, in the alternative, that even if the hearing officer erred in allocation of the burdens of proof, the burden of proof issue is a red herring because the hearing examiner allowed in all evidence without restriction and made credibility determinations. Therefore, the City concludes, a remand would be a waste of time. We disagree.

> The result of the hearing examiner's misallocation of the burdens of proof was not minor. Non-conforming uses are vested property rights which are protected. (citations omitted). Protected property rights cannot be lost or voided easily. There is properly a high burden of proof that must be met by the City before Van Sant loses what was a vested property right.

Van Sant v. City of Everett, 69 Wash. App. 641, 649, 849 P.2d 1276, 1280–81 (1993).

Establishing the correct burden of proof is a very basic tenet of the American legal system. According to Chelan County, such a essential protection is not important. Appellants hope the Court disagrees, and remands this matter back to the Hearing Examiner to produce a decision consistent with the appropriate burden of proof.

3.2 The Moratorium Is Directed At Chelan County And Does Not Limit Appellants' Vested Rights.

The Hearing Examiner found that Appellants' could not have established vested rights through the filing of a building permit application because: "[a] building permit application cannot lawfully vest in uses prohibited by a legally effective moratorium." CP 28.
And he additionally found that the building permit "vested as to all uses allowed in the underlying zoning, with the exception of those uses prohibited by the moratorium." CP 25. These holdings are an erroneous

interpretation of law and an erroneous application of the law to the facts, pursuant to RCW 36.70C.130(1), because the Moratorium itself did not apply to San Juan because San Juan specific circumstances and it did not, by its plain terms, actually prohibit any "uses."

Additionally, Appellants specifically cited to a number of the Hearing Examiner's findings and conclusions that they find objectionable in Appellants' Opening Brief, at 25, 29. Obviously, Appellants challenge these specific findings and conclusions as erroneous interpretations of law, clearly erroneous application of the law to the facts, and not supported substantial evidence. Appellants do not admitted them as verities.

Furthermore, because the County was never required to satisfy a burden of proof, none of the facts in this case put forward by the County have been appropriately established. And because the Hearing Examiner's decision contains no citations to the law, Appellants have no basis to differentiate between findings of fact and conclusions of law.

3.2.1 The Plain Language of the Moratorium Discloses Its Purpose.

The relevant language of the Moratorium (Resolution 2015-94), directing County employees to refrain from accepting or processing cannabis-related development permits, is as follows:

> Chelan County does hereby **ADOPT** a six month moratorium on the **SITING** of licensed recreational marijuana retail stores, production, and processing, and on the **IMPLEMENTATION** of SB 5052 and HB 2136, which shall expire unless **RENEWED** or otherwise **EXTENDED** as provided in RCW 36.70.795 and 36.70A.390.
>
> While this moratorium is in effect, no application for a building permit, occupancy permit, tenant improvement permit, fence permit, variance, conditional use permit, or other development permit or approval shall be **ACCEPTED** as either consistent or complete by any county department.

CP 1654. (emphasis added). For sake of illustration, the verbs of the Moratorium are highlighted in bold and capitalized letters to demonstrate that the conduct to be restrained is solely that of the County's staff – only the staff can adopt, site, implement, renew, extend or accept.

Respondent now argues that the Moratorium somehow forbade cannabis production and processing. *Brief of Respondent*, at 30. However, the Moratorium doesn't prohibit any uses. Rather, its sole purpose is to provide the legal authority for County staff to refuse accepting or processing cannabis-related permit applications. Producing, processing and selling cannabis-related products in Chelan County was still legal and otherwise subject to previously enacted land use ordinances – specifically those adopted under Resolution 2014-5 and Resolution 2014-38 that regulated cannabis as any other agricultural product – and

neither of which were repealed by the Moratorium.

There is no statutory definition of moratoria. "In the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning." *State v. Chester*, 133 Wash. 2d 15, 22, 940 P.2d 1374 (1997). ""Moratorium" is defined as "1 a: a legally authorized period of delay in the performance of a legal obligation or the payment of a debt … b : waiting period set by some authority: a delay officially required or granted … 2 : a suspension of activity: a temporary ban on the use or production of something[[.]" *Webster's Third New International Dictionary* 1469 (2002). "In practice, moratoriums are used by government entities to temporarily suspend certain activities, such as land use practices, while additional action is undertaken or considered." Wash. AGO 2015 No. 1, 2015 WL 3525239. *See* § 4:27.Moratoria, interim zoning controls, 36 Wash. Prac., Washington Land Use § 4:27.

In short, the County's Moratorium against accepting and processing cannabis related permits and applications acted like a gate. And the County's staff was the gatekeeper. If the gate was kept closed by the County staff, no applications were accepted and putative applicants had to wait until the Moratorium was lifted to establish any vested rights. But if County staff opened the gate, there was nothing stopping an

applicant from obtaining permits and operating a cannabis business consistent with the land use controls and ordinances relevant to the underlying zoning on the subject property.

This distinction is important to understand: if County staff determined that the Moratorium did not apply, it had no more authority over the development or use of land, and Respondent had no basis under the law for preventing a business from operating as a cannabis producer and processor.

3.2.2 The Moratorium Should Be Construed Through The County's Contemporaneous Interpretations.

Resolution 2015-94 does not address existing businesses that had sited or were in the process of siting. Accordingly, Chelan County's interpretation of the Moratorium *at the time* is relevant and should be dispositive in discerning its meaning. The Court's "goal in construing zoning ordinances is to determine legislative purpose and intent." *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 126, 186 P.3d 357 (2008). If ambiguous, land use ordinances "must be strictly construed in favor of the landowner." *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). Further, "in any doubtful case, the court should give great weight to the *contemporaneous* construction of an ordinance by the officials charged with its enforcement." *Morin v.*

Johnson, 49 Wn.2d 275, 279, 300 P.2d 569 (1956) (emphasis added).

The Commissioners explicitly approved San Juan's Change of Location Application, both as to the applicant and the location, specifically stating that the Moratorium did not apply. CP 906-907. Further communications between San Juan and Commissioner Walter clarified that the Moratorium would not affect San Juan's ability to obtain the necessary permits to develop the property for cannabis production and processing. CP 1043-1045; *see also* CP 993.

When Respondent received the permit application, County staff was concerned that accepting it would violate the Moratorium. CP 993. Upon direct orders from the Planning Director the permit application was accepted and processed because: "[t]he application requesting this building permit is permitted per the BOCC to proceed with this one permit request as their application to the BOCC for establishment preceded the establishment of the moratorium. Please allow this application to progress." CP 993. At this point the County's top legislative and executive officials opined that the Moratorium did not prevent the County from processing the application as complete because San Juan had already "sited" its operations.

Respondent attempts to distinguish its contemporaneous interpretation of its own Moratorium by calling Appellants' reliance upon statements made to Appellants by County staff as "equitable theories." Appellants' arguments related to these undisputed facts are not "equitable theories" but rather underscore the County's contemporaneous interpretations of its own Moratorium, all of which concluded that the Moratorium simply did not apply to Appellants.

The County cites to a supposed finding of fact made by the Hearing Examiner to the effect that the representations of county officials did not alter the moratorium or the vesting date of San Juan's application. *Brief of Respondent*, at 27 (citing CP 27). While clearly a conclusion of law that is dubious at best, this "finding" completely ignores the proper application of equitable estoppel.

Equitable estoppel applies when there has been an admission, statement, or act that has been justifiably relied on by another. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002). The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; (3) injury that would result to the relying party from allowing the first party to contradict

or repudiate the prior act, statement or admission; (4) equitable estoppel must be necessary to prevent a manifest injustice; and (5) the exercise of governmental functions must not be impaired as a result of the estoppel. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). This standard is met here when applied not to vesting, but to the County's determination that the moratorium did not apply to San Juan.

At the time of San Juan's application for transfer of its license to the County, and at all later times until after Resolution 2016-14 was passed and after San Juan had invested substantial sums in improving the property for its cannabis operations, the County maintained that the moratorium did not apply to San Juan. Thereafter, the County abruptly changed its position and claimed that San Juan only vested to any allowable use *except* cannabis production and processing – hence, the issuance of the Notice and Order. As San Juan had invested in the property and planned to use the property only in these ways, the County's change is devastating to San Juan's business because it would result in San Juan having to close its operations.

Preventing the County from changing its position regarding the application of the moratorium to San Juan will prevent the manifest

injustice of allowing the County to represent to a business that its planned investment and operations are allowed before haphazardly changing its mind. And finally, estopping the County impairs no governmental functions. No public funds are at issue, nor is the County prevented from conducting business as normal.

The County is simply wrong to categorically state that estoppel is irrelevant. San Juan does not claim that estoppel gave it vested rights, but rather that the County is estopped from now denying its own contemporaneous determination that the moratorium did not apply. If the moratorium did not apply to San Juan, the County's enforcement proceedings and this action are unnecessary. The Court should so rule.

3.2.3 The Moratorium Is Not A "Land Use Control Or Ordinance," And Therefore Did Not Affect Appellant's Vested Rights.

Appellants submitted their building permit application and Respondent chose to accept and process it despite the Moratorium. Thereafter, Appellants' application vested to the underlying land use controls and ordinances.

A brief overview of vested rights law is helpful. The purpose of the vesting doctrine is to allow developers to determine, or "fix," the rules that will govern their land development, and is supported by notions of

fundamental fairness. *W. Main Associates v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). The legislature codified the vested rights doctrine as to building permits at RCW 19.27.095(1):

> A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and *the zoning or other land use control ordinances* in effect on the date of application.

RCW 19.27.095(1) (emphasis added). Using principles of statutory interpretation, courts have concluded that a land use control ordinance is "one that 'exercise[s] a restraining or directing influence over land use.'" *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 229, 989 P.2d 569 (1999). Consequently, if vested rights apply to an application for a building permit in Washington, they vest to "zoning or other land use control ordinances," which have been interpreted **to include** those that have "a restraining or directing influence over land use," such as:

- **Surface water drainage regulations**. *See Phillips v. King County,* 136 Wn.2d 946, 968 P.2d 871 (1998).
- **Critical areas ordinances**. *See Erickson & Assocs., Inc. v. McLerran,* 123 Wn.2d 864, 872 P.2d 1090 (1994).
- **SEPA policies**. *See Victoria Tower P'ship v. City of Seattle,* 49 Wn.App. 755, 745 P.2d 1328 (1987).

By comparison, courts have held "zoning or other land use control

ordinances" **not to include:**

- **Impact fees**. *See New Castle Invs. v. City of La Center,* 98 Wn.App. 224, 989 P.2d 569 (1999).
- **Connection fees**. *See Lincoln Shiloh Ass., Ltd. v. Mukilteo Water Dist.,* 45 Wn.App. 123, 724 P.2d 1083 (1986).
- **Stormwater regulations** required under municipal stormwater permit (NPDES) issued by Department of Ecology. *See Snohomish County v. Pollution Control Hearings Board*, 192 Wn.App. 316, 386 P.3d 1064 (2016).

An applicant doesn't vest to moratoria because it does not have "a restraining or directing influence over land use" like a setback, restriction on building height or environmental control would, but rather serves as legal authority for a local jurisdiction to refuse to process certain permits for a prescribed period of time. No Washington case has characterized a moratorium as a "zoning or other land use control."

Additionally, a moratorium does not repeal, amend, modify or contradict established regulations. *Save Our Scenic Area & Friends of the Columbia Gorge v. Skamania Cty.,* 183 Wn.2d 455, 465, 352 P.3d 177 (2015). Clearly, a siting moratorium does not restrain and direct land use under RCW 19.27.095(1) because it does not affect the physical aspects of development. Specifically, the County's Moratorium did not alter any land use code, not change any permitted or prohibited use in any land category. Instead, it gave *the County* the legal authority to refuse accepting certain

kinds of permit applications. CP 1654.

In *Friends of Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wn.2d 320, 346, 310 P.3d 780 (2013), Skamania County passed a moratorium prohibiting the "acceptance and processing of [SEPA] checklists related to forest practice conversions." The Appellants argued that the moratorium was a "land use regulation." The court concluded "the moratorium does not regulate how land is used. Rather, it regulates the county's processing of SEPA checklists and is not a land use regulation." *Id.* at 346.

Thus, much like Skamania County's moratorium on processing SEPA applications, Chelan County's Moratorium does not exercise the restraining and directing influence on land use to otherwise affect the application of vested rights under RCW 19.27.095(1).

3.2.4 A Fully Complete Building Permit Application Vests To The Zoning And Land Use Control Ordinances In Place At The Time Of Submittal.

The requirements for a fully completed application are defined by local ordinance. RCW 19.27.095(2); CCC 14.08.030(2). On November 16, 2015, County officials approved Appellants' fully complete building permit application the associated site plan submitted with the application. CP 487. Under the date certain standard of the vested rights doctrine, an

applicant is entitled to have a building permit processed under the regulations in effect at the time a complete building permit application is filed. *Potala Village Kirkland, LLC v. City of Kirkland,* 183 Wn. App. 191, 334 P.3d 1143 (2014). San Juan fully complied with the County's regulations regarding a fully complete building permit application.

Moreover, the County was fully aware of the intended purpose of the building. While the permit application does not mention "cannabis" or "marijuana" specifically, it does mention "sorting, grading, extracting, and storing" of plants; and it states that an 8-foot fence would be constructed around the perimeter. No agricultural business but cannabis production and processing requires such items – "extraction" and the inclusion of an 8-foot fence being particularly telling.

Most importantly, the building permit application itself contains a notation cross-referencing the November 2, 2015 email from the Planning Director that allowed the building permit to move forward due to the Commissions' belief that the Moratorium did not apply to Appellants, and which in turn also discusses Appellants' planned cannabis uses (e.g. "**see email in file of record dated 11/2/2015 from Director**."). CP 388. It could not be clearer that the County knew that San Juan's building permit application was for the production and processing of cannabis.

Nonetheless, the specific nature of the planned use need not have been stated in the permit application. The numerous interactions between San Juan and the County, during which the County indisputably learned of the planned cannabis related production and processing uses, are more than sufficient to vest San Juan's rights.

In the cases of *Noble Mannor vs. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997) and *Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713 (2000), Pierce County argued that because the respective developers had submitted permit applications that did not specify any use, that the applications did not vest with regard to any particular use. *Noble Manner*, 133 Wn.2d at 285; *Westside*, 100 Wn. App. at 603. From other communications, however, the County had learned of the developers' specific plans for the property; the developers had filled out the County's application with all information required, which was general in nature, and the County accepted the applications as complete. *Noble Manner*, 133 Wn.2d at 285; *Westside*, 100 Wn.App. at 604-05. In both cases, the courts ruled that the developer did reveal their intended uses in the way the process of the county allowed and therefore did establish vested rights with regard to that particular disclosed use. *Noble Manner*, 133 Wn.2d at 285; *Westside*, 100 Wn. App. at 605.

The key considerations in *Nobel Manor* and *Westside* are that (a) the counties' building permit applications didn't require highly specific use information, and, nonetheless (b) the counties each knew of the particular use, regardless of how the particular use was communicated. The application of *Noble Manor* and *Westside* to the instant case is clear. Chelan County cannot, as it has tried, claim that Appellants vested to some agricultural uses—*e.g.*, cherries and apples—but not cannabis because the application does not detail such a use. The building permit application wasn't that specific. CP 451 – 452. And, as evidenced by the prior approvals (CP 906-907) and communications from the County (CP 993) the record is replete with evidence that the County knew of the intended use.

The acceptance and issuance of Appellants' building permit application by Chelan County vested Appellants to the right to conduct activities consistent with the underlying zoning on the property. The Hearing Examiner's Decision is a clearly erroneous application of the law to the facts and an erroneous interpretation of the law when he found that the Moratorium operated to interfere with those rights.

3.3 San Juan Established Nonconforming Rights by Operating its Business on the Property.

A nonconforming use is "a use that lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the [current] zoning restrictions applicable to the district in which it is situated." *Rhod–A–Zalea & 35th, Inc. v. Snohomish County,* 136 Wash.2d 1, 6, 959 P.2d 1024 (1998); *see also* Chapter 11.97 Chelan County Code.

Citing the cases of *King County Dep't of Dev. & Envtl. Servs. vs. King County,* 177 Wn.2d 636, 305 P.3d 240 (2013) and *Anderson vs. Island County*, 81 Wn.2d 312, 501 P.2d 594 (1972), Chelan County argues that San Juan's failure to complete construction activities prior to the change in zoning regulations negated San Juan's ability to "establish" any nonconforming rights. *Brief of Respondent, at 34.* Respondent misunderstands and misapplies the cases cited by suggesting a bright line rule on the establishment of nonconforming uses.

For example, in *Anderson* the landowner moved its gravel operations to a newly purchased tract of land with the intent of also moving its cement batching plant to the same location. Several months later, the county amended the zoning code to designate the land as residential. Soon thereafter, the landowner began construction of a cement batching plant. The court held that a while nonconforming rights may

exist for gravel operations, a nonconforming use did not exist for the cement batching plant because that use did not actually precede the zoning change on that property. *Anderson*, 81 Wn.2d at 321.

A short review of the *King County* case reveals that the Supreme Court in that case drew its narrow conclusions based upon a statutory interpretation analysis of the language of King County's nonconforming use ordinance, which is considerably more detailed and completely different than Chelan County's ordinance. *King Cnty Dep't of Dev. & Envtl. Servs. vs. King Cnty,* 177 Wn.2d 636, 643-648, 305 P.3d 240 (2013). As such, the *King County* case does not create any rules about the amount of use that must occur on a property in Chelan County to create nonconforming rights.

Additionally, Respondent suggests that Appellants needed to be licensed by the State to have gained any nonconforming rights. *Brief of Respondent*, at 34. Respondent cites no case authority for this proposition. Conversely, the Court in *Van Sant vs. City of Everett,* 69 Wn.App. 641, 849 P.2d 1276 (1993) pointed out that "[c]ourts have repeatedly found that licensing and other regulations *unrelated* to land use approval, whether business licensing, business and occupation tax regulations, or building permits, are not per se determinative of the continuance of a non-

conforming use." *Id. at* 651–52. Nonetheless, San Juan was licensed in 2014, the County approved of its license transfer on October 5, 2015 (CP 1906) and once San Juan had developed the property in compliance with state regulations the state approved the transfer of the license on April 14, 2016. CP 1037 At all times relevant to this matter San Juan was licensed.

There can be no question that San Juan used the property for the production and processing of cannabis, and therefore established nonconforming rights to continue to do so through a reasonable amortization period. The vested rights discussion is linked to the issue of nonconforming rights. Upon issuance of the building permit, Appellants vested to the right to develop the property consistent with any relevant land use control ordinances in effect at the time of that issuance. Immediately thereafter Appellants began to develop the property with the County's full knowledge and blessing of its intended use. Not recognizing Appellants' nonconforming rights would eviscerate the doctrine of vested rights. If the government can change the rules in mid-development, after issuing a permit that it knows of its intended use. This fickle and "fluctuating policy" of government is precisely what the vested rights doctrine was intended to address. In *W. Main Associates v. City of Bellevue,* 106 Wash. 2d 47, 51, 720 P.2d 1328 (1986) the Court expressed

the principle this way:

> As James Madison stressed, citizens should be protected from the "fluctuating policy" of the legislature. *(citation omitted)*. Persons should be able to plan their conduct with reasonable certainty of the legal consequences. (citation omitted). Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.

Chelan County approved San Juan's location on October 5, 2015 (CP 906 – 907)) and issued it a building permit on November 16, 2015 (CP 143; CP 487). Consistent with these approvals, San Juan began to conduct site preparation and construction activities. By February 7, 2016 (date of Resolution 2016-14) Chelan County had approved of San Juan's use of the site and San Juan was fully under construction to ready itself for the coming 2016 growing season. In fact, even after the passage of Resolution 2016-14, Chelan County continued to conduct six additional construction-related inspections and approvals on San Juan's facility. CP 833 – 885; CP 451 – 508). The record reflects that prior to Chelan County changing its position and issuing Petitioner a Stop Work Order on July 7, 2016, Appellants had spent over one million dollars preparing the site in satisfaction of state requirements. CP 877, at ¶¶13, 18. San Juan has established nonconforming rights for the use of cannabis growing and processing on the Property.

4. CONCLUSION

Appellants respectfully request that the decision of the Chelan County Hearing Examiner, which upheld all but one of the claims from Chelan County's Notice and Order be overturned, pursuant to RCW 36.70C.130(1), because: (1) the Hearing Examiner engaged in unlawful procedure and failed to follow a prescribed process by placing the burden of proof on Appellants; (2) the decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise because it ignores Appellants' vested and nonconforming rights and the County should otherwise be estopped from changing its position to Appellants' detriment; and (3) the decision is a clearly erroneous application of the law to the facts.

Respectfully submitted this 6th day of April, 2018.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare under penalty of perjury and the laws of the State of Washington that on the 6th day of April, 2018, I caused a true and correct copy of the of the APPELLANTS' REPLY BRIEF, to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following:

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Re-filing as one PDF document rather than three PDF documents. The Table of Authorities was also corrected to address a few pagination errors.

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